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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-727

ALFONSO J. CERVANTES,
Petitioner,

v.

TIME, INC. and DENNY WALSH,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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BRIEF FOR RESPONDENTS* IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Petitioner, Mayor of St. Louis, seeks a writ of certiorari to the United States Court of Appeals for the Eighth Circuit which, on August 17, 1972, denied a petition for rehearing from its affirmance, on July 20, 1972, of summary judgment in favor of respondents in the District Court. Petitioner's suit is based on a claim of defamation in an article appearing in the May 29, 1970 issue of Life magazine, entitled "A Two-Faced Crime Fight in St. Louis". That article dealt with the amazing appointment by the Mayor of Morris Shenker, leading organized crime at-

*Petitioner and respondents are plaintiff and defendants, respectively, in the courts below and are generally referred to herein as such.

torney, as head of the St. Louis Commission on Crime and Law Enforcement.

OPINIONS BELOW

The opinion of the Court of Appeals (there were no dissents) is reported at 464 F.2d 986. It is annexed to the petition as Appendix A, pp. A-1 through A-15. The opinion of the District Court is reported at 330 F. Supp. 936 and is annexed to the petition as Appendix C (pp. A-16 through A-24).*

QUESTIONS PRESENTED

The questions sought to be presented by the petition (p. 2) were not reached below. Properly stated, the questions presented by this case are simply:

1. Are respondents entitled to summary judgment, under the First and Fourteenth Amendments, dismissing the complaint when both courts below found that they have made a conclusive showing, which has not been rebutted, that they did not have knowledge of falsity or serious doubts as to truth concerning the article, or any item appearing therein, upon which suit is brought?

2. Can the fact that the reporter—who investigated the facts upon which the article was based and who fully disclosed all written material utilized and the identity of most of the sources upon which he relied—refused to disclose the identity of a limited number of sources whose information confirmed reports which were utilized in connection with three paragraphs of

*For convenience, references herein to the opinions below will be to pages of the Appendix to the petition.

an 87 paragraph* article be allowed to deprive respondents of their right, for which they have qualified in every other element, to summary judgment with respect to an article dealing with a subject matter of the highest public interest, organized crime, when both courts below found, on the basis of a well-developed record consisting of affidavits, depositions and other documentary evidence, that (1) neither respondent "had knowledge of falsity, that neither entertained serious doubts as to the truth of any statement in the article, and that neither acted with reckless disregard of truth or falsity" and (2) that petitioner "has not produced a scintilla of proof supportive of a finding that either [respondent] in fact entertained serious doubts about the truth of a single sentence in the article"?

STATEMENT

This is a libel action brought by plaintiff, the Mayor of St. Louis, on the basis of an article published in defendant Time Inc.'s magazine Life accusing the Mayor of maintaining "business and personal ties with the gangsters that operate in his city." The article consists of 87 paragraphs. Despite the attack which the article made on his fitness for public office, plaintiff significantly complains of only four paragraphs, apparently hoping thereby to avoid both the thrust of the article and the other 83 paragraphs. For the convenience of the Court, we submit herewith copies of the article on which each paragraph is appropriately numbered and the four paragraphs of which plaintiff complains—*i.e.*, paragraphs 11, 12, 27, 31—are bracketed.

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*As described later, plaintiff complains of only four of the 87 paragraphs in the article. The refusal of the reporter to identify his sources relates only three of these four paragraphs, each of which was corroborated by documents furnished to plaintiff by defendants.

To put this case in its proper perspective it is appropriate to describe the thrust of the article by brief reference to various of the 83 paragraphs which plaintiff does not complain about and which, as the courts below noted, he either admitted or did not explicitly deny.

Plaintiff knows that organized crime flournishes in St. Louis (pars. 5-6). Yet, he has publicly denied the existence of organized crime in St. Louis, despite the activation of a special United States Government task force against organized crime in St. Louis (par. 1). Notwithstanding all of this, in January 1970 plaintiff appointed Morris Shenker, "the foremost lawyer for the Mob in the U. S." (par. 8), as head of his Commission on Crime and Law Enforcement (par. 2). Life's charge that the Mayor and his new crime commissioner had personal ties with the underworld is based upon plaintiff's uncontroverted dealings and his business and personal ties with Shenker and with plaintiff's friend and campaign manager, Anthony Sansone, the son-in-law of James Michaels, a notorious gang leader (pars. 10, 13-14, 15-26, 28-30, 87). The article details not only the tangled activities of Shenker (pars. 8, 35-87), but also shows how the Mayor was involved with Sansone (pars. 10, 14-22, 26, 28-30), and thus, in turn, with Michaels and Anthony Giardano, the St. Louis leader of the Cosa Nostra (pars. 10, 26, 32-34). Indeed, plaintiff admits in his own "book" entitled "The Mayor, The Magazine and the Truth", which he published after the Life article and has widely distributed in St. Louis, that Sansone "has been a close friend of mine for more than 20 years" and is a son-in-law of Jimmy Michaels (p. 48).

Any time that the mayor of a major city in this country which has organized crime has a friend and campaign manager who is the son-in-law of a gang leader in his city and appoints as Chairman of his Crime Commission the fore-

most lawyer for organized crime in the United States, he invites, without more, the article's label of "phony" or "two-faced" with respect to his crime fight in his city, particularly when he disclaims the existence of organized crime in his city and thus shields it from risk of action by his Crime Commission. The heart of the matter is that plaintiff has close ties with Sansone and Shenker—and Sansone and Shenker are closely tied with organized crime —and that is precisely what the article detailed and what plaintiff in the main admits. These are the "ties with gangsters" that plaintiff himself says is the thrust of the article. Against that central thrust of the article and the 83 paragraphs which plaintiff does not challenge, the four paragraphs which plaintiff does complain about are minor indeed, as the courts below noted.*

Moreover, as the courts below found, each of the four challenged paragraphs was corroborated by documents, the authenticity of which was unchallenged, so as to negate malice (see the opinion of the District Court at pp. A-21 through A-23 of the petition, and the opinion of the Court of Appeals at pp. A-9 and A-10 and A-13 through A-15). Thus, with respect to the statements in paragraphs 11 and 12 of the article defendant Walsh had information, substantiated by documents 10 and 12 described in Appendix D to this brief, that plaintiff met with Michaels and Sansone, the Mayor's campaign manager at Rite Way in December of 1964, and also that Sansone met with Michaels and Giardano, also at Rite Way, in March of 1964, to discuss

*The 83 paragraphs which plaintiff does not challenge spell out precisely the same unflattering conclusions about plaintiff that are contained in the four paragraphs he does challenge. As the District Court said, " . . . the four paragraphs complained of here have little or no impact on the total article. In context, the four paragraphs are a minute and relatively ineffective portion of the article as a whole." (Pet., p. A-23). See also the opinion of the Court of Appeals (Pet., pp. A-7, A-8).

the local election. The statement in paragraph 27 of the article that Michaels wrote insurance through plaintiff's insurance agency is substantiated by documents 3, 4 and 6. With respect to the last of the four challenged paragraphs, no. 31, plaintiff admittedly attended the funeral of Dorothy Michaels, which was also attended by the elite of the underworld (documents 19, 20, 21), and Walsh had information, substantiated by documents 20, 32, and 34, that plaintiff attended the funeral of another Michaels relative in January 1970 (which was not mentioned in the article) and attended the get-together at the Sansone home following Dorothy Michaels' funeral.

The careful editorial process followed by Life in the preparation and publication of the article was fully revealed in extensive pretrial discovery conducted by plaintiff. The article was initially written by defendant Walsh who did the basic investigative work for it. Thereafter, the article was rewritten by Life Senior Editor Russell Sackett and Life Associate Editor Thomas Flaherty, edited by Senior Editor Scot Leavitt, and Managing Editor Ralph Graves, and checked by Reporter Janice Pikey and Attorneys Gabriel Perle and Harry Johnston, and, with respect to the authentication of certain government documents, by Attorney William Hundley. The depositions of all of them were taken by plaintiff and reveal quite clearly that all those who had anything to do with the article believed in its truth. In addition, defendants produced all the documents, literally hundreds, which were utilized as source material for the article.

Defendants moved for summary judgment on the ground that plaintiff could not prove "actual malice" in the constitutional sense as required by the *New York Times* (376 U. S. 254) line of cases in this Court. Plaintiff opposed because defendant Walsh, who had fully disclosed all written material utilized in the preparation of the article

and the identity of most of the sources upon which he relied, refused to reveal the identity of some informants in the Department of Justice (Walsh feared they would lose their jobs and, also, feared that there was "danger of physical harm") who had supplied him with some of the reports and information used in the preparation of three of the four challenged paragraphs; plaintiff also moved to compel Walsh to reveal those sources.

The District Court granted summary judgment for defendants. It found from the extensive deposition and documentary evidence that "defendants had no knowledge of falsity, no serious doubt concerning the truth of any statement in the article, and certainly no reckless disregard of whether or not statements in the article were false" and that "Plaintiff has failed to produce or raise any issue as to actual malice on the part of the defendants". The District Court also found that defendant Walsh's refusal to reveal his sources "has no bearing on the malicious intent of the defendants *under the facts of this case*" (italics added). In the light of those findings the District Court concluded that it was not necessary to pass on plaintiff's motion to compel Walsh to disclose his sources. See pp. A-23 and A-24 of the petition.

The Court of Appeals affirmed. It concurred in the District Court's factual findings and conclusion that defendants were entitled to summary judgment as a matter of law. It likewise concluded, "on the facts of this particular case", that the District Court did not err in refusing to pass on plaintiff's motion to compel the disclosure of Walsh's sources because the facts clearly showed that defendants were entitled to summary judgment and that, "quite apart from the tactics employed in collecting data for the article", plaintiff could not prove "actual malice" (pp. A-9 and A-10 of the petition). And the Court of Appeals specifically left open the question whether, under other and diff-

erent circumstances, it might be in order to compel disclosure of news sources before summary judgment could be granted (pp. A-10, A-11 and A-13 through A-15 of the petition.)

ARGUMENT

(a) This case does not warrant review

The result below was correct and in accordance with the applicable decisions of this Court beginning with *New York Times.** There is no conflict of decisions. The courts below followed precisely the same legal doctrine as ruled upon by the Ninth Circuit in *Cerrito* v. *Time, Inc.*, 499 F. 2d 306 (9th Cir. 1971), *affirming* 302 F. Supp. 1071 (N. D. Cal. 1969). Those decisions, in turn, are completely consistent with like decisions by the Southern District of New York in *Konigsberg* v. *Time, Inc.*, 312 F. Supp. 848 (1970) and the Supreme Court of the State of New York in *Schwartz* v. *Time, Inc.*, unreported, No. 15937/1969, rendered March 1, 1972. A copy of the *Schwartz* opinion is attached hereto for the convenience of the Court as Appendix A. There are no contrary decisions, and there is simply nothing in this case warranting the attention of this Court, particularly since this case was decided on the basis of its particular facts, as to which concurrent findings were made by the two courts below, and the application of familiar concepts for summary judgment.

In essence, plaintiff is relying on a claim that defendants should not have had the information they had, neglect-

*We will be relying in this brief upon decisions in this Court in *New York Times* v. *Sullivan*, 376 U. S. 254, *Garrison* v. *Louisiana*, 379 U. S. 64, *Time, Inc.* v. *Hill*, 385 U. S. 374, *St. Amant* v. *Thompson*, 390 U. S. 727, *Greenbelt Pub. Assn.* v. *Bresler*, 398 U. S. 6, *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29, and *Branzburg* v. *Hayes*, 408 U. S. 665. For brevity, we shall refer to those decisions of this Court simply by identification of the case and the page number of the opinions upon which we rely.

ing the fact that the sole issue in a libel action of this kind is knowledge of falsity or serious doubts as to truth, and upon a claim of negligence. With respect to the first claim, the Court of Appeals correctly ruled as follows (pp. A-9 and A-10 of the petition):

> "... Nevertheless, on the facts of this particular case, we believe that in his preoccupation with the identity of Life's news sources, the mayor overlooked the central point involved in this appeal; that the depositions and other evidentiary materials comprising this record establish, without room for substantial argument, facts that entitled both defendants to judgment as a matter of law, *viz.*, that, quite apart from the tactics employed in collecting data for the article, the mayor has wholly failed to demonstrate with convincing clarity that either defendant acted with knowing or reckless disregard of the truth."

With respect to the claim of negligence, plaintiff disregards the fact that negligence cannot be equated with knowledge of falsity or serious doubts as to the truth, as repeatedly stated by this Court in *New York Times*, p. 288, *Garrison*, p. 79, *Hill*, p. 389, *St. Amant*, pp. 731-2 and *Metromedia*, pp. 50-1.*

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*Plaintiff's argument (Pet., pp. 22-25) that, because Life claims to have conducted a year-long investigation it should be held to a standard of reasonableness, is merely a rerun of his negligence argument. If, in fact, plaintiff doubts that Life conducted such an investigation, then it is this "falsehood" on which Life should be challenged. However, the length of Life's investigation is well documented and not in dispute, and plaintiff is thus left with the frivolous contention that whenever a publisher conducts a lengthy investigation of fact, his protection under the doctrine of *New York Times* v. *Sullivan* vanishes. It is hard to imagine a rule which would do more to deter responsible reporting.

(b) Application of constitutional protection

Plaintiff is Mayor of St. Louis and the article dealt with his connections with organized crime. Constitutional protection thus applies to the article both under the public official rule of *New York Times* and the public interest rule of *Metromedia.*

(c) Qualification for constitutional protection

The facts as to defendants' state of mind and activities are crystal clear and were examined in detail by both courts below. There patently was no knowledge of falsity or serious doubts as to truth, and that is the end of the case. We think these points are clear from a mere reading of the opinions below. However, as an aid to the Court, we annex hereto, as Appendix B, extracts from our brief below dealing with testimony as to the editorial process, as Appendix C, extracts from our brief below setting forth plaintiff's purported rebuttal proof and as Appendix D, a digest of 36 documents, culled from the hundreds of documents utilized by the Life editors and furnished to plaintiff, which suffice to show written material upon which the article was based. Those appendices set forth with more detail and precision the nature of the proof presented below with respect to falsity, knowledge of falsity and serious doubts as to truth. There can be no doubt, based thereon, that defendants qualified for constitutional protection and for summary judgment in their favor, as the courts below found after a careful, extensive and studied examination of the voluminous record.

(d) A failure to reveal all sources cannot bar the granting of summary judgment in this action

We recognize that if this case involved application of the principles enunciated by this Court in *Branzburg,* then

a question might be presented worthy of review. However, those constitutional questions were not reached in this case since it is not necessary to deal with them in granting summary judgment for defendants despite the lack of complete disclosure as to all sources. Contrary to plaintiff's argument (Pet., pp. 16-21), the decisions below do not hold that newsmen have a First Amendment privilege to withhold the identity of their sources. Instead, the courts below found it unnecessary to pass on the question of constitutional privilege because the facts of this case showed that defendants were entitled to summary judgment regardless of the failure to disclose some sources, and the same is true of the *Cerrito, Konigsberg* and *Schwartz* cases which follow the same principle as the instant case. Since these cases thus rest on factual determinations in the application of settled principles regarding summary judgment, rather than on a question of constitutional privilege for non-disclosure, they do not warrant review by this Court.

To elaborate, we have proceeded in these cases on a *corroboration* theory. If the facts supplied by the undisclosed sources are sufficiently corroborated by the facts supplied by disclosed sources so that a conclusive showing of good faith may be made, then the undisclosed sources need not be disclosed since their identity then becomes immaterial. In essence, while we believe that this is a case "where legitimate First Amendment interests require protection" (*Branzburg*, 408 U. S. p. 710), that issue is not reached under the facts in this case since proof of *corroboration* has been presented which makes the undisclosed sources irrelevant, irrespective of the constitutional protection for newsgathering.

The Court of Appeals below agreed with this theory and stated (pp. A-14 and A-15 of the petition—footnotes omitted):

> ". . . Where, as here, the published materials, objectively considered in the light of all the evidence, must be taken as having been published in good faith, without actual malice and on the basis of careful verification efforts, that is, they were published in good faith without regard to the identity of the news sources, there is no rule of law or policy consideration of which we are aware that counsels compulsory revelation of news sources. Neither is there any evidence by which a jury could reasonably find liability under the constitutionally required instructions. When these factors conjoin, the proper disposition is to grant the defense motion for summary judgment. . . ."

In so far as the Court of Appeals thought it necessary to advert to the *Branzburg* principles, they are discussed in the footnotes on pages A-11 and A-15 of the petition as follows:

> "Indeed, as the Court observed in *Caldwell*, n. 9, *supra*, 'without some protection for seeking out the news, freedom of the press could be eviscerated.' 40 U. S. L. W., at 5030. Similarly, to compel a newsman to breach a confidential relationship merely because a libel suit has been filed against him would seem inevitably to lead to an excessive restraint on the scope of legitimate newsgathering activity."
>
> "*Caldwell* makes clear that harassment of the press undertaken not for legitimate reasons is without justification. 40 U. S. L. W., at 5038; at 5039 (opinion of Powell, J). To compel disclosure under

the circumstances shown by this record would seem to constitute precisely the harassment *Caldwell* seeks to curb."

We submit that the theory which we have been following flows inevitably from the decisions of this Court in *New York Times* and its progeny and, since it has been unanimously approved by both the Ninth and Eighth Circuits, need not be reviewed by this Court.* We may mention that the theory was evolved in an effort to enable Life magazine to accede to the pleas of two Presidents, Presidents Johnson and Nixon, that the press report to the American people on organized crime. President Johnson's plea appears in the Challenge of Crime in a Free Society: A Report by the President's Commission on Law Enforcement and Administration of Justice, p. 208, issued in February, 1967. President Nixon's plea is contained in his message to Congress of April 23, 1969 (115 Cong. Rec. H 2949-2951). Life's editorial process has been carefully geared to meet that objective and to conform to the theories expressed by this Court in *New York Times* and its progeny. Since both the Ninth and Eighth Circuits, as well as the Southern District of New York and the Supreme Court of New York, are unanimous in approving that editorial process, there is nothing that this Court need review at this time, unless

*In addition to the lack of conflict, it should be emphasized that this case is a singularly inappropriate one for review by this Court. As previously stated, the court below did not hold that compulsory disclosure of sources may never be required before granting summary judgment. Instead, it held that on the facts of this case disclosure was not warranted, and it left open the question of whether, under different facts, it might be in order to require disclosure before summary judgment could be granted. Since that result rests on the concurrent findings of the facts by both courts below, "a very obvious and exceptional showing of error" must be made to warrant this Court's attention, *Graver Mfg. Co.* v. *Linde Co.*, 336 U. S. 271, 275; *Berenyi* v. *Immigration Director*, 385 U. S. 630, 635. There is simply no such error here.

and until there should evolve a conflict in the circuits. We think the correctness of the view expressed by those courts is sufficiently clear that there is little chance that there will be a conflict in the future.*

The course we suggest is consistent with action taken by this Court in refusing to review the granting of summary judgment in other First Amendment libel cases** presumably on the ground that the Federal Circuit and state courts had correctly and with unanimity performed their proper house cleaning function, in accordance with the clear indications concerning the deterrent effect on the freedom of the press of unwarranted exposure to libel trials as set forth in the decisions of this Court, *New York Times*, p. 279; *Hill*, p. 389; *Metromedia*, pp. 52-3. That same course should be followed here, particularly in view of the facts of this case and the concurrent findings of both courts below.

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*_Garland_ v. _Torre_, 259 F. 2d 545 (2d Cir. 1958), relied on by plaintiff in his attempt to create the mirage of a conflict between circuits is easily distinguished from this case. Unlike the defendants in the instant action, the defendant in *Garland* could offer no corroborative support for her assertions. Life, by contrast, had substantial evidence independent of the identity of Walsh's sources to support the truth of the statements contained in its article. That no conflict between the Circuits currently exists is made abundantly clear by a comparison of *Konigsberg* (S. D. N. Y.), *Schwartz* (New York State) and *Cerrito* (9th Circuit) with the opinion of the Eighth Circuit in this case.

**_Washington Post Co._ v. _Keogh_, 385 U. S. 1001; _Thompson_ v. _Evening Star Newspaper Co._, 393 U. S. 884; _Tagawa_ v. _Maui Publishing Co._, 396 U. S. 822; _United Medical_ v. _Columbia Broadcasting System_, 394 U. S. 921; _Time, Inc._ v. _McLaney_, 395 U. S. 922; _Sellers_ v. _Time, Inc._, 400 U. S. 830.

CONCLUSION

For the reasons stated, the petition does not present any questions warranting review by the Court and should be denied.

December 1, 1972.

Respectfully submitted,

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APPENDIX A

SUPREME COURT

NEW YORK COUNTY

SPECIAL TERM—PART I

MARTIN (RED) SCHWARTZ,
Plaintiff,

—against—

TIME INC., THE NEW YORK TIMES CO. and SANDY SMITH,
Defendants.

15937/1969

CULKIN, J.:

This is an action for libel. Plaintiff seeks $1,000,000 damages by reason of an article appearing in Life Magazine. Defendant Time Inc. and defendant Sandy Smith, in companion motions, move for summary judgment pursuant to CPLR 3212. Plaintiff Martin "Red" Schwartz makes a cross motion for an order pursuant to CPLR 3124 compelling defendant Sandy Smith to answer certain questions propounded to him during his examination before trial and upon his failure to answer said questions to strike his answer pursuant to CPLR 3126.

The Life article of which complaint is made appeared in the June 20, 1969 issue of that magazine and dealt with the then front page story of Joe Namath's resignation from organized football following a directive by Football Commissioner Peter Rozelle that Namath give up his interest in his nightclub Bachelors III, since it was frequented by "undesirables". After giving the background of the controversy, the article went on to detail that there were at least thirteen "hoods" and "undesirables" who frequented the

club including three Cosa Nostra members, two thieves, two drug dealers and six gamblers, including plaintiff Schwartz, who were characterized as being "unsavory". The plaintiff was named with five other men as being "gamblers, principally lottery operators and bookies." The first cause of action is based on the article itself and the second and third causes of action upon quotations from the article in New York and Los Angeles newspapers. The fourth cause of action is directed against the New York Times.

Defendants' position is that Smith's characterizations of the plaintiff as published by Time Inc. are protected by the First Amendment to the United States Constitution, unless plaintiff can demonstrate "actual malice". They contend that Smith's refusal to disclose sources cannot bar the granting of summary judgment which is mandated by constitutional principles.

Plaintiff argues that he has raised an overriding issue of fact which warrants the denial of defendants' motions for summary judgment. That issue of fact is whether defendants did act with "actual malice" in publishing untrue statements with respect to the plaintiff. Plaintiff contends that he will be able to prove, with convincing clarity, at trial, that defendants Smith and Time Inc. acted with reckless disregard for the truth. He asks that defendants' motions for summary judgment be denied and plaintiff's cross motion for an order compelling the defendant Smith to reveal his sources of information should be granted.

There can no longer be any doubt that the publication of which this action complains falls within the scope of the privilege afforded by the First Amendment. Under that privilege, first enunciated in *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), a publisher is protected

with respect to publications concerning matters of "public interest". The court held, there, that publications involving the activities of persons holding public office were constitutionally protected. While *New York Times* happened to involve the case of a public official, the rationale for the privilege was clearly broad enough to justify its extension to all matters of general or public concern. The concepts of "public official" and "public figure" are but one facet of, and are comprehended within, the concept of "public interest" as expressed by the explicit language of the Supreme Court in *New York Times Co.* v. *Sullivan, supra,* at page 269; *Garrison* v. *Louisiana,* 379 U. S. 64, 74-75 (1964); *Rosenblatt* v. *Baer,* 383 U. S. 75, 84-86 (1966); *Time, Inc.* v. *Hill,* 385 U. S. 374, 387-388 (1967); *Curtis Publishing Co.* v. *Butts,* 388 U. S. 130, 150-152 (1967), and *St. Amant* v. *Thompson,* 390 U. S. 727, 731-732 (1968).

It became apparent that legitimate public interest in the subject matter of the publication, rather than the identity of the plaintiff, was the proper focus of the constitutional inquiry. Numerous court of appeals have explicitly so held. *United Medical Laboratories* v. *C. B. S.,* 404 F. 2d 706 (9th Circuit 1968), *cert. denied* 394 U. S. 921 (1969); *Time, Inc.* v. *McLaney,* 406 F. 2d 565 (5th Circuit 1969), *cert. denied,* 395 U. S. 922 (1969). Finally, in *Rosenbloom* v. *Metromedia, Inc.,* 403 U. S. 29, the Supreme Court expressly adopted the "public interest" test for defamation. Thus, it is now settled that the constitutional privileges announced in *New York Times* apply to all publications regarding matters as to which the public has the right to be informed.

New York courts also held, even before *Rosenbloom,* that communications involving matters of public concern must fall within the protection of the *New York Times*

privilege. *Garfinkel* v. *Twenty-First Century Publ. Co.*, 30 A D 2d 787, 291 N. Y. S. 2d 735 (1st Dept. 1968); *All Diet Food Distributors Inc.* v. *Time, Inc.*, 56 Misc 2d 821, 290 N. Y. S. 2d 445 (1967); *Fotochrome, Inc.* v. *New York Herald Tribune*, 61 Misc 2d 226, 305 N. Y. S. 2d 168 (1969).

The activities of organized crime, which is what is involved in this case, is clearly such a matter of public concern and interest. The pervasive influence of criminal organizations is constantly in the public mind and has been a major issue in recent years. As a result the mantle of constitutional protection covers the article upon which this suit is brought.

The Supreme Court has laid down the following constitutional standards for publications entitled to protection: a plaintiff may not recover unless he proves with "convincing clarity" that the article was published "with 'actual malice' —that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times*, 376 U. S. at 280. It is for the courts to determine whether this standard has been met. They must examine the statements in issue and the circumstances under which they were made, to ascertain whether the proof presented to show "actual malice" has "the convincing clarity which the constitutional standard demands. . . ." (Id. at pp. 285-86). These principles, enunciated in *New York Times* and repeated in *Garrison* v. *Louisiana*, 379 U. S. at 74, have remained constant as the Supreme Court has extended the doctrine of *New York Times* to articles involving public figures and matters of public interest. In *St. Amant* v. *Thompson*, 390 U. S. 727 (1968), the Court explained that:

> "These cases are clear that reckless conduct is not measured by whether a reasonably prudent man

would have published or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." 390 U. S. at p. 731.

The burden of proving actual malice is on the plaintiff, *Cepeda* v. *Cowles Magazines & Broadcasting, Inc.*, 392 F. 2d 417 (9th Cir. 1968) *cert. denied*, 393 U. S. 840 (1968), who must make an affirmative showing of facts from which defendants' probable knowledge of constitutional falsity may be constitutionally sustained. *Thompson* v. *Evening Star Newspaper Co.*, 394 F. 2d 774, 776 (D. C. Cir.), *cert. denied*, 393 U. S. 884 (1968). The mere hope of questioning the credibility of defendants' witnesses is not sufficient to resist summary judgment. *Hurley* v. *Northwest Publications, Inc.*, 273 F. Supp. 967, 974 (D. Minn. 1967), *aff'd on opinion below*, 398 F. 2d 346 (8th Cir. 1968). Further, "actual malice" may not be presumed or inferred from the nature of the defamatory statement, *New York Times* v. *Sullivan*, 376 U. S. at p. 273. Neither may it be inferred from the failure to seek out plaintiff to verify the facts before publication, *Hurley* v. *Northwest Publications, Inc.*, *supra*.

The facts of this case reveal reasonable care in the research and preparation of the article. The depositions of the employees of Time, Inc. show the editorial process by which this article was prepared. Defendant Time, Inc. reasonably relied upon a careful investigation by a knowledgeable, experienced crime reporter whose reputation for

integrity is impeccable. The plaintiff has not offered evidence that suggests to this court that Smith or Life Magazine had any reason whatsoever to doubt that the matters reported were true. It is not enough for plaintiff to try and show that defendants could have investigated more. Negligence cannot be equated with knowledge or serious doubt. Also, plaintiff's contentions as to the falsity of the article do not bear upon proof of knowledge of falsity. The record clearly indicates that plaintiff is unable as a matter of law to discharge the burden imposed on him of showing defendants' knowledge of falsity.

The necessary constitutional corollary to the constitutional test and its application is that summary judgment must be granted as soon as it becomes clear that plaintiff cannot establish "actual malice". In *Dombrowski* v. *Pfister,* 380 U. S. 479, 487 (1965), the court made clear that it is necessary that frivolous libel suits be dismissed summarily to avoid the "chilling effect" on freedom of speech and press that an expensive defense entails. In *Washington Post Co.* v. *Keogh,* 365 F. 2d 965, 968 (D. C. Cir. 1966), *cert. denied,* 385 U. S. 1011 (1967), the court held that the defendant was entitled to summary judgment, stating that summary judgment was an essential part of the rules developed to ensure the First Amendment guaranty of freedom of press. The *Keogh* reasoning has since been followed by a multitude of First Amendment cases which have granted summary judgment in applying constitutional principles. *Hurley* v. *Northwest Publications,* 273 F. Supp. 967 (D. Minn. 1967), *aff'd on opinion below,* 398 F. 2d 346 (8th Cir. 1968); *Thompson* v. *Evening Star,* 394 F. 2d 774 (D. C. Cir.), *cert. denied,* 393 U. S. 884 (1968); *Time, Inc.* v. *McLaney,* 406 F. 2d 565 (5th Cir.) *cert. denied,* 395 U. S. 922 (1969); *Bon Air Motel, Inc.* v. *Time, Inc.,*

295 F. Supp. 704 (S. D. Ga. 1969); *aff'd* 426 F. 2d 858 (5th Cir. 1970).

The reasoning in the above cases is fully accepted by the courts of the State of New York. *Cohen* v. *New York Herald Tribune,* 63 Misc 2d 87 (Sup. Ct. Kings Co. 1970); *Droner* v. *Schapp,* 34 A D 2d 823 (2nd Dept. 1970); *Lloyds* v. *United Press Int.,* 63 Misc 2d 421 (Sup. Ct. New York Co. 1970); *Silbowitz* v. *Lepper,* 32 A D 2d 520 (1st Dept. 1969); *Pauling* v. *National Review,* 22 N Y 2d 818 (1968); *Gilberg* v. *Goffi,* 21 A D 2d 517 (2nd Dept. 1964) *aff'd no opinion,* 15 N Y 2d 1023 (1965); *Frink* v. *McEldowney,* 29 N Y 2d 720 (1971).

Moreover, failure by a defendant to disclose the identity of all its sources will not bar the granting of summary judgment, at least with respect to articles dealing with subjects of vital public interest, such as organized crime, provided sufficient other proof and sources are disclosed to satisfy a court of the defendant's good faith. *Cerrito* v. *Time, Inc.,* 302 F. Supp. 1071 (N. D. Calif. 1969); *aff'd* 449 F. 2d 306 (9th Cir. 1971); *Konigsberg* v. *Time, Inc.,* 312 F. Supp. 848 (S. D. N. Y. 1970); *Cervantes* v. *Time Inc.,* 330 F. Supp. 936 (E. D. Mo. 1971).

Here, defendant Smith has not revealed his sources for valid reasons. A disclosure of names would involve a material threat of mob reprisals against these informants. Moreover, disclosure would tend inevitably to cut off Smith's access to these and other informants, at once destroying his capacity as a reporter in an area of critical importance to the public and depriving him and the public of the fundamental right of access to the news under the First Amendment. Defendants rightfully contend that the identity of

Smith's informants is not material to the primary issue of whether Life's actions in printing the statement concerning plaintiff was malicious and was made with reckless disregard of the truth. The defendant Time, Inc. reasonably relied on Smith's reputation and the review of its editorial staff in reaching the conclusion that the allegations made were substantially true. Plaintiff has failed to present evidence which would lead this court to conclude that Time's asserted failure in requiring defendant Smith to disclose the identity of his sources was motivated by malice or reckless disregard.

Accordingly, the defendants' motions for summary judgment are granted.

Plaintiff's motion to compel Smith to reveal his sources is accordingly denied. Settle order.

Dated: March 1, 1972.

GERALD P. CULKIN
J. S. C.

APPENDIX B

These principles are set forth to illustrate the outer boundaries of the actual malice standard. The facts of this case reveal exemplary care in the research and preparation of the article. The uncontradicted depositions of defendant Time, Inc.'s employees show the thorough nature of the investigation which was conducted. Viewed against a standard which requires only that the publisher be free from actual serious doubts as to truth, this showing clearly forecloses any hope of plaintiff's recovery.* There was no doubt whatever in the minds of defendant Time, Inc.'s employees as to the truth of the facts stated in the article.

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*Plaintiff adverts to the distinction which has been noted in some early decisions of the difference between "hot" news and projects of a more extended nature (although the degree of extension for constitutional purposes was not defined and is illusive), much as reference was made in earlier cases to public officials, public figures, the degree of anonymity of the plaintiff and the ability on the part of the plaintiff to respond. We think that such a distinction has been abandoned, much as public officials, public figures, degree of anonymity and ability to respond were explicitly abandoned as a basis of decision in *Metromedia*. As stated in *Winters* v. *New York*, 333 U. S. 507, 510 (1948): "The line between the informing and the entertaining is too illusive for the protection of that basic right."

Plaintiff fails to note that the *Butts* case on which he relies was decided on June 12, 1967. On November 6, 1967, decision was rendered in *Beckley Newspapers* v. *Hanks*, 389 U. S. 81, in which there was no investigation whatsoever. On April 29, 1968, decision was rendered in *St. Amant* v. *Thompson*, 390 U. S. 727, in which "reckless disregard" was defined as "serious doubts as to truth" (p. 731). And in both *St. Amant* (pp. 731-2) and *Metromedia* (pp. 50-1) the Court stressed that a negligence standard could not apply. The sole test, then, whatever the character of the "public interest" communication, is knowledge of falsity or serious doubts as to truth.

However, the distinction is immaterial here since defendants' investigation was patently painstaking and thorough, so much so in fact that plaintiff, whose integrity we question, can complain solely of four out of 87 paragraphs. But the remaining 83 paragraphs patently spell out the precise unflattering conclusions as to plaintiff that may be reached from the four.

Appendix B

Let's start with the basic facts of which plaintiff does not complain, *i.e.*, (1) plaintiff was a close personal friend for over twenty years of his campaign manager Sansone; (2) Sansone is the son-in-law of top St. Louis gangster James Anthony Michaels, Sr.; (3) Shenker is the leading spokesman for organized crime in this country; (4) plaintiff appointed Shenker to head both his "subsystem" on crime and his Commission on Crime; (5) in publicity concerning the Crime Commission and the "subsystem" on crime, no mention was made of organized crime; (6) plaintiff publicly denied the existence of organized crime in St. Louis; and (7) the United States Government proclaimed the existence of organized crime in St. Louis and sent a special task force to St. Louis one month prior to the article for the purpose of dealing with organized crime—presumably because plaintiff had effectively ensured that St. Louis itself could not and would not deal with it.

Once that showing is made on facts of which no complaint is made the labels "Phony Crime Fight" and "Two-Faced Crime Fight" fit like a glove. All that is thus needed for defendants' case is corroboration in which they, in good faith, believed. Contrary to plaintiff's apparent contention defendants *are not* obligated to prove plaintiff guilty beyond a reasonable doubt—it is plaintiff who must show himself not guilty *and* prove malice with convincing clarity.

We believe that this matter of "corroboration" is the key to present *New York Times* cases on actual knowledge of falsity or serious doubts as to truth (*that concept is vital to the entire summary judgment doctrine—for that reason, we here emphasize its import*). The reference to the December 1964 Rite Way meeting of plaintiff, Sansone and Michaels, the March 1965 Rite Way meeting of Sansone, Michaels and Giardano, and the June 1967 "get-

together" at the Sansone home with the elite of the underworld are all helpful in evaluation of plaintiff's action in appointing Shenker. But none would ever have been reported by Life absent corroboration. Those three meetings were referred to against a background of (1) the facts which establish that plaintiff's appointment of Shenker as head of the Commission on Crime was "phony" and "two-faced", (2) copies of genuine Department of Justice documents which evidenced the existence of those meetings and (3) a host of other facts concerning the Sansone-Cervantes, Sansone-Michaels, Sansone-Giardano, Shenker-Giardano and Shenker-Cervantes relationships. The necessary corroboration is there. That is the end of the constitutional case and plaintiff, constitutionally, cannot prevail since this is not, as pointed out by the Supreme Court in *St. Amant,* the case of an anonymous informer. It is much more and the necessary corroboration has been established. What more does one need? Once good faith is established independently of the nondisclosed souces, that is the end of the matter constitutionally. If Walsh had not the facts which established the "phony crime fight", the documents and the host of other facts concerning the Cervantes-Shenker-Sansone-Michaels-Giardano relationships. he might be obligated to disclose (we will deal with that case when it appears, if ever)—but with them he clearly is not obligated for purposes of this action.

Let us turn to plaintiff's personal and business ties with the underworld. First, his ties with Shenker and Shenker's ties with the underworld are set forth in the portions of the article of which no complaint is made (see also doc. 35). Secondly, his ties with Sansone are admitted. Sansone, in turn, had a personal and business relationship with his father-in-law (whose criminal career is graph-

ically described in doc. 2) which was described by Walsh at his deposition (App. p. 126; Dep. pp. 238-9) and which is substantiated by docs. 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 20, 28. Sansone also deals with Giardano (as substantiated by docs. 12, 14, 16, 21, 27, 28) and Giardano is the head of one of two Missouri Cosa Nostra families as described in Life of September 1, 1967 (doc. 22), which was checked by Life's committee of experts (see *Cerrito* decision, *infra,* p. 27). Sansone also invested money ($150,000) in The Frontier in Las Vegas (doc. 24) which was "owned by the 'Outfit' " (doc. 23).

We think we could stop with that proof as evincing the basis of defendants' good faith and be entitled to summary judgment. But there is more. The fact that Michaels wrote insurance through plaintiff's insurance agency is substantiated by docs. 3, 4, 6. The mayor's ownership of Mound City Tobacco Company, which sells to the underworld, is not complained of. Likewise, the fact that the President of Mound City guaranteed a loan to Giardano by a company of which plaintiff was an officer is substantiated by doc. 7, and no complaint is made of that fact.

Plaintiff admittedly attended the funeral of Dorothy Michaels, which was also attended by the elite of the underworld (docs. 19, 20, 21), and Walsh had information, substantiated by docs. 20, 32 and 34, that plaintiff attended the funeral of another Michaels relative in January 1970 (which was not mentioned in the article) and attended the get-together at the Sansone home following Dorothy Michaels' funeral.* Walsh also had information, substantiated by

*Interestingly enough, plaintiff does not dispute the presence of the elite of the underworld at Sansone's home following Dorothy Michaels' funeral in June 1967—he only disputes his presence there. But where does that leave plaintiff's good friend Sansone? And plaintiff admits he attended the funeral—at which the elite of the underworld were also present. St. Louis should be proud of him.

docs. 12 and 13, that plaintiff met with Michaels at Rite Way (a corporation formed by Shenker—doc. 1) in December 1964 and at the opening of a restaurant in May 1966, the latter fact not having been mentioned in the article.

In the face of that proof we add that Walsh talked to people at the Department of Justice who assured him that his information regarding the December 1964 Rite Way meeting, the March 1965 Rite Way meeting and the June 1967 Sansone get-together was true and correct. But defendants' case is complete without that check since Walsh had sufficient without that check upon which to base a good faith belief in the truth of that which he wrote. For that reason, the disclosure of sources, which plaintiff here seeks, is irrelevant to this action. To hold otherwise would penalize that investigation—for Walsh could have omitted that re-check and still be entitled to publish on the basis of that which he had. *Cf. Beckley Newspapers Corp.* v. *Hanks,* 389 U. S. 81 (1967), in which there was no investigation whatsoever and yet the defendant was protected by the Constitution.

We submit that we have demonstrated beyond peradventure of a doubt the credibility of defendant Time, Inc.'s employees, including defendant Walsh, in stating under oath that they believed in the truth of the article at the time of publication and still believe in the truth of the article.

And just what has plaintiff done to establish actual knowledge of falsity or serious doubts as to truth with convincing clarity? He has been given hundreds of documents utilized in connection with the preparation of the article. He has deposed over a five-day period Walsh, Pikey, Johnston, Flaherty, Graves, Perle, Leavitt, Hundley, Sackett and Friedman, constituting each and every person who had anything to do with the truth or falsity of the article.

Appendix B

There is not one whisper of a fact that will bear on proof essential for plaintiff's case. Each and every person has affirmed his or her belief in the truth of the article, with the exception of Hundley who merely authenticated the genuineness of the Government documents and did not purport to pass on truth or falsity, and each and every person has shown that there was good reason for that belief.

Plaintiff apparently, and mistakenly, believes that a showing that defendants could have investigated more and could have phrased portions of the article differently suffices to show actual knowledge of falsity or serious doubts as to truth. But even assuming that plaintiff has made such a showing (which is not the case), negligence cannot be equated with knowledge or serious doubt. The Supreme Court has made it quite clear that no such equation will be tolerated: *New York Times* (376 U. S. at p. 288); *Garrison* (379 U. S. at p. 79); *Hill* (385 U. S. at p. 389); *St. Amant* (390 U. S. at pp. 731-2); *Metromedia* (403 U. S. at pp. 50-1).

Let's examine plaintiff's approach in specifics. One of the matters of which plaintiff complains is the statement in the article (doc. 27) that "mobster Jimmy Michaels himself wrote insurance through Cervantes' firm until 1962". Plaintiff agrees that Michaels is a mobster, as indeed he must. Plaintiff disputes the remainder. Those words were based on notes made by Research Pikey in Jefferson City in January 1970 at the Missouri Division of Insurance (docs. 3, 4). Doc. 3 recorded Michaels' renewal application for an insurance broker's license on April 11, 1962, which listed the Cervantes firm as one of Michaels' agencies. Doc. 4 recorded a letter of the Insurance Division to the Cervantes agency of April 20, 1962, which set forth that, "This applicant has stated he has brokered business through your agency in the

past twelve months," as well as the devious and unresponsive reply of the Cervantes agency that, "We have nothing for this man at present. Understand that he wants to broker business with us."

Walsh and Pikey gave those documents, as they appeared in Pikey's notes, as the basis for the statement in the article and their belief in the truth of the statement, and Johnston, Perle, Flaherty, Sackett and Leavitt gave Walsh and Pikey's oral description of those documents from Pikey's notes as the basis for their belief in the truth of the statement in the article. While the application did not in so many words state that Michaels had actually brokered business, aside from the inference to that effect from the instruction to list the license with the Cervantes agency, the Division of Insurance in writing to the Cervantes agency obviously based its letter either on that interpretation of the application and instruction or on a direct statement made by Michaels to it in the course of the investigation of Michaels that the Division of Insurance was then conducting and of which Pikey had been informed (Dep. pp. 57, 86, 90). Based on the Division of Insurance letter the Life editorial personnel were entitled to treat the letter either as the Division of Insurance interpretation of the application and instruction or as a Division of Insurance assertion of that which had been stated by Michaels. Under either theory the result was the same—an assertion by Michaels that he had brokered business through the Cervantes agency. What possible motive would Michaels have to lie under those circumstances?

Plaintiff's counsel spent literally hours with each and every witness (except Hundley and Friedman) emphasizing that the application made no such explicit statement. But since the Missouri Division of Insurance, the author-

ity having jurisdiction over such matters, had either itself so interpreted the application and instruction or had received a direct statement from Michaels during the course of its investigation of him, such proof does not in the slightest negate defendants' belief in the truth of the statement in the article based on the Michaels application and instruction, the Division of Insurance letter reporting Michaels' statement and the Cervantes agency evasive reply.

That plaintiff cannot be permitted to predicate a finding of knowledge of falsity or serious doubts as to truth upon defendants' interpretation of the insurance documents is additionally established by the Supreme Court in *Time, Inc.* v. *Pape,* 401 U. S. 279 (1971). The Court there specifically refused to allow "the adoption of one of a number of possible rational interpretations of a document that bristled with ambiguities" to be made the basis for a findings of "actual malice", and stated:

> ". . . The deliberate choice of such an interpretation, although arguably reflecting a misconception, was not enough to create a jury issue of 'malice' under *New York Times.*" 401 U. S. at 290.

Plaintiff's counsel also spent hours with respect to the statements in the article (pars. 11, 12, 31) concerning the December 1964 and March 1965 Rite Way meetings and the June 1967 gathering at Sansone's home following the funeral of Michaels' wife. But the inescapable fact is that those three meetings were dealt with specifically in Government memoranda (docs. 10, 11, 12, 13, 19, 20, 21), relied on by Walsh (as anyone else would do) described by Walsh to the other Life personnel and whose genuineness was authenticated by Hundley. No amount of cross-examination can eradicate those obvious and conclusive facts. *Time, Inc.* v. *Pape, supra.*

We say then that plaintiff has not presented one shred of evidence to challenge the validity of defendants' motion for summery judgment. An extensive and prolonged cross-examination based on pre-New York Times libel concepts can not possibly establish the truth of knowledge of falsity or serious doubts as to truth.

Facts gathered by Walsh over a period of many months were checked, analyzed, tested and evaluated by seven separate persons including one researcher, four editors and three attorneys over a period of many weeks. If that process has not demonstrated a valid and honest belief in that which was published about a public official who, on facts which are not disputed, instituted a "Phony Crime Fight", then the lesson of *New York Times* and its progeny has not been learned—and it will be impossible to report on organized crime which is menacing the nation.

APPENDIX C

A. Defendants have made a conclusive showing of good faith which has not been rebutted.

We use the term "good faith" as a convenient shorthand to indicate a showing that defendants had no knowledge of falsity (*New York Times*) or serious doubts as to truth [*St. Amant* v. *Thompson*, 390 U. S. 727 (1968)]. The Supreme Court has also phrased the matter that way. Thus, in *New York Times* the Court explicitly stated: "A defense for erroneous statements honestly made is no less essential here" (376 U. S. p. 278) and barred action on such statements "believed to be true" (*id.*, p. 279). Again, in *Garrison* v. *Louisiana*, 379 U. S. 64 (1964), the Court stated that: "Utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth" (p. 73). The record is bare of any indications whatsoever by plaintiff of an ability to demonstrate the contrary "with convincing clarity" (*New York Times*).

And what is plaintiff's proof? It does not bear upon defendants' mental state, which is the issue here, but solely upon truth—as to which also plaintiff is the loser and as to which he also bears the burden of proving falsity with convincing clarity (*Garrison*, 379 U. S. p. 74), or else he is out of Court.

1. The damning affidavits

Plaintiff and his friend Sansone finally, when forced, presented affidavits (App, pp. 506-14). They speak for themselves—their effect is complete proof of callous indifference and blindness to integrity that is simply unbelievable. Apparently it is now quite correct for the Mayor of one of our country's major cities and his friend and campaign manager openly to associate with the criminal underworld. Let's look at those affidavits, starting with friend Sansone.

Sansone now admits that "over the years I have been in Mr. Michaels' company" (usually in connection with "family" functions) and that "on occasions I have stopped at his place of business." Why? His incredible explanation is that it was "to drop off a gift from my wife or a cake or particular dish that she has made." He has known Giardano for 20 years and admits that he was together with Giardano and Michaels in March 1965 at the Rite Way Cigarette Company (confirmed in the Schaaf affidavit). He admits having dinner with Giardano and Michaels. He does not deny the December 1964 meeting at Rite Way, although he does deny that he "took" plaintiff there or "brought together" plaintiff and Michaels. He does not deny that they got together in his presence (no doubt to discuss cakes and pastry). Significantly, he makes no reference whatsoever to the facts disclosed in docs. 6, 8, 9, 13, 15, 16, 23, 24 and 28 concerning his activities or matters dealt with in the article.

Plaintiff himself does not deny that he met with Michaels at Rite Way Cigarette Sales in December 1964 although he does say that he was not at "the offices" of Rite Way. He admits that "over the years, on a very few occasions I have seen Mr. James Michaels." He confirms that Giardano was granted a loan by Lindell Trust Company while he was a member of the Board. He admits that he was part owner and Vice President of Mound City Tobacco Company and that it sold to the vending machine companies. He lamely explains his appointment of Shenker as head of the Crime Commission "because I thought it would be good for St. Louis" (—he doesn't say why he thought it would be good—or for whom else he thought it would be good). Just like Sansone, he significantly makes no mention whatsoever of other matters dealt with in the article.

No affidavits are presented by Shenker, Michaels or Giardano. No effort is made to answer the serious questions raised by the article about plaintiff's "Phony Crime Fight." It apparently suffices for plaintiff and Sansone to state blandly that they have not sinned—while admitting a more than casual acquaintance with organized crime. We repeat —the affidavits speak for themselves, but in favor of defendants. At best these affidavits go to the first element of proof, namely, truth. They have nothing whatever to do with the second necessary element that plaintiff must, but cannot, prove, namely, knowledge of falsity or serious doubts as to truth.

2. The insurance quibble

That which was covered *ad nauseam* on cross-examination of defendants' witnesses is now repeated. But nothing can gainsay the unambiguous language of the Stegeman letter ("The applicant has stated that he has brokered business through your agency in the past 12 months") against the background of the filing of Michaels' license with the Cervantes agency and the evasive reply of Heckman. Life relied on this evidence—who wouldn't (Walsh Dep. pp. 138, 156, 418, 423)? Neither Clay nor Stegeman denies that Michaels said he had brokered with the Cervantes agency and neither assert any personal knowledge about his dealings with the agency. They do not deal with that plain statement but instead make an unconvincing attempt to "construe" the evasive Heckman reply as stating that no insurance had been written. The clearest possible answer to that contention was given by Janice Pikey in her deposition (App. p. 229; Dep. pp. 84-5):

> "Q. What would Mr. Heckman have had to say in your mind, in your opinion, in order to inform Mr. Stegeman that Michaels had not written any insurance through the Cervantes firm?
>
> "A. Perhaps just that."

The matter of the Bland transcript of Insurance (Clay, Stegeman and Heckman affidavits) is no more than another quibble. When Pikey reported to Walsh upon her return to New York that it might be a Cervantes agency transcript, Walsh pointed out the error and stated that he already knew that it was a Bland transcript (Pikey Dep. p. 28; App. p. 210).

Whatever the facts might be as to Michaels' writing insurance through the Cervantes agency—certainly a minor cog in the story—there is no possible doubt that defendants believed, and with good reason, in the truth of the statement.

3. The funeral party

Bauman, the purported professional journalist, did not have the courage, for reasons best known to him, to report the facts that the people of St. Louis should have known about plaintiff. He conveniently omits from his affidavit the fact that another Globe reporter procured corroboration of Walsh's story (Walsh Dep. pp. 100-102; App. pp. 55-6). He also omits the fact that he himself had doubted plaintiff's credibility when he telephoned Sansone and that Sansone agreed: "You have no choice. I guess you have to go with it" (plaintiff's exhibit 1-D pp. 6, 7).* Bauman apparently ignores the fact that plaintiff attended the funeral, also attended by the leaders of the underworld, as being of no significance. His reference to Musial must be discounted by the fact that Musial was described as an acquaintance of ten years' standing in Michaels' original application for insurance! Moreover, Walsh had related the entire incident to Sackett, who cor-

*It is interesting to note that Bauman didn't even rise to Sansone's standards of responsible reporting.

rectly concluded that Bauman had been clearly wrong in his decision.

Plaintiff makes much of the fact that both he and Sansone denied that plaintiff attended the get-together. The answer here is that defendants simply did not trust their credibility, and for good reason. Sansone moved from a denial that members of the underworld had been at the affair to an admission that they had, and argued the innocence of the Mayor's presence while insisting that he wasn't there (plaintiff's exhibit 1-D pp. 3, 4). This understandably destroyed friend Sansone's credibility for Walsh (Walsh Dep. pp. 81, 438-9).

Plaintiff's credibility was no better. His "alibi" meeting with Griesedieck and Joe Sansone turned out to be no alibi at all (as defendants ascertained when Salerno was sent to St. Louis to check with Griesedieck—see doc. 34)! It was then learned by Life that plaintiff's meeting with Griesedieck was concluded by 10:30 a.m.—thus the mayor's "alibi" appears to be a phony, since the reception at the Sansone house following the burial was held later in the day. Yet, that "alibi" was offered right up to publication of the article (plaintiff's exhibit 1-C p. 6). That hurt plaintiff's credibility, to say the least (Walsh Dep. pp. 56-7, 81-7, 90, 261-3; App. pp. 28-9, 41-6, 48, 132-4).

4. The Rite Way meetings

The two Rite Way meetings were unambiguously established by FBI reports, fully verified by Department of Justice contacts, and in part admitted by Sansome and plaintiff. What more does one need?

We repeat. *There is not one whisper of a fact to show knowledge of falsity or serious doubts as to truth.*

APPENDIX D

Extracts from 36 documents of those relied on by Walsh concerning pertinent portions of Article.

12/13/57 [doc. 1] Letter Shenker to Secretary of State—incorporates Rite Way.

3/23/61 [doc. 2] Letter St. Louis Police Department to U. S. Attorney General—gives information regarding James Anthony Michaels, Sr.—"leader of the old Cuckoo Gang"—"reputed to be the most feared gunman here in the Twenties"—"respected and feared by the Underworld"—"has out of town connections with the hoodlum elements"—"has been arrested approximately 65 times since 1924 on charges of Murder, Armed Robbery, Gambling and other charges, but has only one conviction"—in prison 1934-1949 on armed robbery conviction.

4/11/61 [doc. 3] Janice Pikey notes regarding renewal application for insurance broker's license by Michaels—instructs that copies of license be sent to "A. J. Cervantes, Cobb, Walsh."

4/20/62 [doc. 4] Janice Pikey notes regarding letter insurance division to Cervantes, Cobb, Walsh—reports Michaels' application—"this applicant has stated he has brokered business through your agency in the past twelve months."

8/22/62 [doc. 5] Extract from I. R. S. report—reports interview Sansone "regarding his dealings with his father-in-law"—"On August 22, 1962, Sansone advised by telephone that he would refuse to answer our questions because it would be embarrassing to him because of his close relationship to Michaels, Sr."

9/ 5/62 [doc. 6] Extract from F. B. I. report—lists those for whom Michaels had written insurance including Anthony Sansone and Joseph Sansone—notes report in Post Dispatch that Michaels' license revoked—quotes Post-Dispatch that "Michaels was licensed as an insurance broker May 12, 1960, and listed four agencies with which he intended to do business, "including Cervantes, Cobb, Walsh.

2/15/63 [doc. 7] Extract from F. B. I. report—notes that Anthony Giardano has paid income tax assessment with money borrowed from Lindell Trust Company—"the loan is secured by a savings account passbook of James Holland, President of Mound City Tobacco Company, St. Louis, supplier of cigarettes to Anthony Novelty Vending Company."

9/13/63 [doc. 8] Extract from F. B. I. report—reports interview with Sansone—"He advised he has been instrumental in selling homes in that subdivision to his father-in-law, Michaels, Sr."

8/31/64 [doc. 9] Extract from F. B. I. report—notes conversation with Sansone from which informant "had gained the impression that Sansone was scared of some of the deals in which he was 'fronting' for subject" [Michaels].

12/4/64 [doc. 10] Extract from F. B. I. report—reports one hour meeting at Michaels' office of "an individual believed to be" Cervantes with Sansone and Michaels.

12/ /64 [doc. 11] Undated handwritten memorandum by Walsh—"Dec. 1964. Was Cervantes. Talked about mayoralty campaign."

Appendix D

3/26/65 [doc. 12] Extract from F. B. I. report—details St. Louis police memorandum reporting meeting Rite Way of Giardano, Michaels and Sansone —"the portion of the conversation which was overheard by Detective Sergeant Ed Schaaf all pertained to the coming local election."

5/18/66 [doc. 13] Extract from F. B. I. report—reports grand opening of restaurant attended by Cervantes, Sansone and Michaels.

5/27/66 [doc. 14] Extract from F. B. I. report—reports interview with restaurant proprietor who advised that Sansone brought Giardano and Michaels to his restaurant to eat dinner.

8/26/66 [doc. 15] Extract from F. B. I. report—Dorothy Michaels, wife of James Michaels, "continues to collect rents from apartments" owned by Michaels but held in name of Sansone Realty Company, owned and operated by Sansone.

9/19/66 [doc. 16] Extract from unidentified report—reports meeting of Sansone and Giardano.

2/20/67 [doc. 17] Globe-Democrat article—headline "Cosa Nostra Groups in St. Louis, Other Cities, Form Core of Organized Crime, U. S. Study Says"—"A presidential crime commission has reported that the 'core of organized crime' consists of 24 La Cosa Nostra groups operating as criminal cartels in large cities across the nation. The commission was given evidence showing that the cities include St. Louis and Kansas City, The Globe-Democrat learned."

3/2/67 [doc. 18] Globe-Democrat article by Walsh—quotes "top U. S. Justice Department crime fighter,"

Henry E. Peterson, as stating that Michaels was an "ally by treaty" with the syndicate.

6/9/67 [doc. 19] Extract from F. B. I. report—reports funeral of Dorothy Michaels attended by Giardano.

6/9/67 [doc. 20] Extract from F. B. I. report—details attendance at Dorothy Michaels funeral—details attendance after funeral at Sansone residence—"At this get-together Mayor Cervantes was in attendance and acted as bartender serving drinks."

6/9/67 [doc. 21] Extract from F. B. I. report—"all of the hoodlums in the St. Louis area attended the funeral of Dorothy Michaels."

9/1/67 [doc. 22] Extract from Life article—identifies Giardano and Civella as leaders in Missouri of two of 24 Cosa Nostra families throughout the country [this was the article checked for accuracy by the board of experts in *Cerrito* v. *Time, Inc.*, 302 F. Supp. 1071 (N. D. Cal. 1969)].

9/7/67 [doc. 23] Extract from F. B. I. report—"the Frontier Hotel in Las Vegas is owned by the 'Outfit' and this is a place where members of the 'Outfit' now stop when arriving in Las Vegas."

1967 [doc. 24] Undated handwritten memorandum by Walsh—"Sansone borrowed $25,000 from Frank Cusumano as part of the purchase money for $150,000 worth of Vegas Frontier, Inc. debenture bonds in 1967."

1967 [doc. 25] Extract from undated memorandum—"On a Justice Department map of crime syndicate activities, St. Louis is pegged as one of the major syndicate centers in the midwest."

1/17/68 [doc. 26] Globe-Democrat article—"the Mayor said, in answer to a reporter's question at a city hall press conference, that he has never heard of any organized crime here." This pronouncement came in the face of one made the day before in St. Louis by U. S. Attorney General Ramsey Clark that the men of La Cosa Nostra ply their trade here. Again Thursday evening on a prerecorded television interview, Mr. Clark placed the mob in St. Louis and noted it leaned toward legitimate enterprises here, undermining the economic fabric of the community—"Mr. Vinson feels another obstacle in the path of law enforcement's drive against organized crime is much of the public's refusal to face the fact of La Cosa Nostra."

4/26/68 [doc. 27] Extract from F. B. I. report—"Anthony Sansone recently took sixty plus persons to dinner at Saro's restaurant"—"among those present" was Giardano.

9/5/68 [doc. 28] Michaels present at wake of Sansone's father "as were practically all of the Syrian and Italian hoodlum element in St. Louis."

10/10/69 [doc. 29] Cervantes press release—discusses reasons for formation of Commission on Crime and Law Enforcement—no mention of organized crime.

11/2/69 [doc. 30] Post-Dispatch clipping—announces appointment of Shenker as Chairman of the subsystem.

12/2/69 [doc. 31] Globe-Democrat clipping—"The Justice Department will establish a strike force of federal lawyers and investigators in St. Louis next spring as part of the government's expanding war on organized crime."

1970 [doc. 32] Undated handwritten memorandum by Walsh—"at Timmy Michaels wake greeted by Jimmy who introduced him around."

1/18/70 [doc. 33] Post-Dispatch clippings—announce appointment of Shenker as head of St. Louis Commission on Crime and Law Enforcement.

2/12/70 [doc. 34] Handwritten notes by Walsh—"Salerno 2/12/70—Joe G. said his two appointment records (one portable and one in his office) reflects a 9:30 a.m. on the day in question at City Hall. The meeting, on a tax matter, was attended by five people and lasted no more than hour. Those present were Joe G., the Mayor, Joe S. and 2 of Joe G.'s people. (Check clips on funeral)."

3/6/70 [doc. 35] Post-Dispatch clipping—reports complaints regarding high rent being paid by Federal Government at 210 North Twelfth Boulevard —quotes Government spokesman, "the very idea that we must move into the new building at higher rent is abhorrent, particularly in view of the fact that politicians are connected with the company that owns it."—refers to fact that two

of the associates owning building are Shenker and Murphy—"Both are lawyers and business associates of Mayor Alfonso J. Cervantes and both are influential in Democratic politics."—Murphy "is the Mayor's personal attorney."

4/3/70 [doc. 36] Globe-Democrat clipping—"U.S. Gathering Forces to War Against Organized Crime Here"—quotes government spokesman, "We have intelligence and background on organized crime which began concentration in this area 10 years ago."